



EXHIBIT 2

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SB 288

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Via Hand Delivery

Chairman Keith Regier

Federal Relations, Energy and Telecommunications Committee

RE: Written Comments S.B. 288

Dear Chairman Regier and Members of the Committee:

The biggest change to current law in S.B. 288 is the attempt to change the word "condemnor" to "State or its agents," in most, but not all places, of the condemnation statutes, which creates inconsistency. Also, the bill proposes a new definition for "state or its agents." This definition purports to give any entity with the power of eminent domain, an agency relationship to the State of Montana, and vice versa. The definition is poorly drafted and inappropriately attempts to bestow agency status on private entities.

The legal concept of "agency" is "A fiduciary relationship created by express or implied contract or by law, in which one party (the *agent*) may act on behalf of another party (the *principal*) and bind that other party by words or actions." *Black's Law Dictionary*, 8th Edition at 52. An "agent" is "One who is authorized to act for or in place of another; a representative." *Id.* at 54. A "government agent" is "An employee or representative of a governmental body." *Id.* A "state agency" is defined in Montana's laws as "an officer, board, commission, department, or other entity within the executive branch of state government." Mont. Code Ann. § 2-10-103(3).

The power or eminent domain is a power held by the state. Mont. Code Ann. § 70-30-101. A private party only enjoys the power to condemn when there is an express legislative grant, and those grants are construed strictly in favor of private property. *McCabe Petroleum Corp. v. Easement & Right-of-Way Access Across Twp. 12 N., Range 23 E.*, 2004 MT 73, ¶ 8, 320 Mont. 384, 87 P.3d 479. Thus, the power of eminent domain is bestowed by statutory grant and not by the creation of an agency relationship.

S.B. 288 conflates the powers of a state agency (or agent) with a statutory grant of authority. As worded, the proposed § 70-30-101(4) would essentially bestow state agency (e.g. like the Montana Department of Transportation) status to any private entity that has a statutory grant to exercise the power of eminent domain. Such an inartfully crafted definition will lead to not only confusion as to which entities (either state or

private) have the power of eminent domain, but would potentially be an unparalleled expansion of state government. Also, it would create liability for the State since the State is liable for its agents. Therefore, there should be a fiscal note attached to this bill as drafted.

Specifically:

Section 1:

This section adds new appraisal requirements that will add unnecessary expense and litigation to the condemnation process. The language is inartful and does not follow the current definitions used in the appraisal guidelines. This section does not solve any current problems and does nothing to assist landowners.

Section 2:

This is a new section that adds a lot of process to the precondemnation procedures. This process is not due process or helpful to the landowner. In fact, it helps the condemnor because the bill provides if, "the state or its agents believe an impasse exists between the parties after acting ... the state or its agents may declare an impasse," and proceed with the condemnation process. Section 2. (4). Also, this section does nothing to alleviate the condemnor's gaming of the system. It is a lot of process that really does nothing good for the landowners.

Also, the new section would require the property owner to reply within 15 days of the written notice. This is not enough time, and if the property owner is traveling or otherwise away from their property, the property owner will likely not even have received notice prior to the fifteen day time period running.

Finally, this section violates current property law because it provides the condemnor with the right of entry. Under current law, if the property owner does not provide permission, the condemnor must seek an injunction to enter the property. Allowing entry without the landowner's permission is a significant violation of a landowner's constitutional and property rights.

Section 3.

Currently, § 70-30-101, MCA, has one sentence providing, "Eminent domain is the right of the state to take private property for public use. This right may be exercised in the manner provided in this chapter." S.B. 288 would add other definitions and modify the current language in § 70-30-101, MCA. The new definitions are not correct according to the appraisal guidelines. Also, these definitions are not helpful to either party in the condemnation process. There is nothing broke, so there is nothing to fix in this area.

It seems the only reason for this bill is a back door attempt to further grant entities the right to condemn. However, this vague language will not likely pass the Montana Supreme Court's holding:

the authority to condemn must be expressly given or necessarily implied. The exercise of the power being against common right, it cannot be implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication. When the right to exercise the power can only be made by argument or inference, it does not exist. *State v. Aitchison*, 96 Mon. 335, 30 P.2d 605 (1934).

The language in this bill is exactly the type of language that the Supreme Court stated would not give the right to condemn. Further, it is my understanding that the supporter of this bill is seeking condemnation authority for mining projects. In the past, the case law has been interpreted to grant fairly wide authority for mining projects to condemn and this bill may actually weaken that authority.

Also, the "subject property," cannot mean the property interest being appraised, it has to mean the property interest being taken or damaged.

Section 4.

This section of the bill makes one change to § 70-30-102, MCA, which enumerates the current public uses for which a condemnor may exercise public use. The one change is in (44) and would serve to make the issues more unclear. Currently, the law provides that "minerals owned by the condemnor," and under the change it would provide, "minerals owned by the state or its agents." I think this change would mean that only the state could condemn property for mining.

Section 5.

This section has the same problem as Section 4, it makes it so only the state or its agents can condemn property. Also, § 60-4-102(2), MCA, only applies to highways. Therefore, to change "condemnor" to "state or its agents" makes no sense at all.

Section 6.

This section has the same problem as Section 4, it makes it so only the state or its agents can condemn property for coal development.

Section 7.

In this section, the bill deletes the requirement that agency is limited to those entities "in charge of the public use." Again, it does not make sense to delete these words. Because the condemnation statute is supposed to be limited to public uses.

Also in this section, the bill would change "condemnee" to "property owner." A normal property owner that is not in condemnation would not be subject to this statute. It is much clearer for the law to use the word "condemnee" in this section. Also, the bill modifies the term "condemnor" to "state or its agent," which has been addressed earlier in this letter.

Section 8.

This section would modify the term "condemnor" to "state or its agent," which is addressed elsewhere. Also, this amended section would allow the "state or its agent," the "condemnor" to meet the criteria necessary for condemnation simply by believing an impasse exists. The law as it currently exists requires the condemnor to prove that the condemnor made a written offer and the condemnee rejected that offer. The change to allowing the condemnor to meet the statutory requirements based on the condemnor's beliefs is unprecedented. This change would not be good for the landowners involved in condemnation.

Section 9.

This section makes significant changes to this section of the statute. First, the amendment muddles issues related to putting the condemnor into possession into this statute dealing with appointment of the condemnation commissioners. Also, the two provisions are at odds with each other.

In this statute, the bill would require the "condemnor" (note condemnor is used in this section not "state or its agent") to deposit an amount of money equal to the condemnor's appraisal value. Then under this bill he condemnee may withdraw up to seventy-five percent of this money. Currently, and in Section 10 of this bill, the condemnee can withdraw seventy-five percent of the money deposited by the condemnor. Therefore, there are two things wrong. The bill itself is inconsistent internally and if Section 9 survives the landowner has significantly less money to withdraw.

Section 10.

Section 10 of the bill requires the condemnor to pay into the court twenty-five percent instead of one hundred percent of the appraised value, as in Section 9 of this bill. Currently, if the landowner believes his property is worth \$100,000 and asks for that amount in his claim for just compensation, then in order to take possession of the property, the condemnor must deposit that much money. Under this bill, for example, if the condemnor believes the property is worth \$40,000 instead of the \$100,000 claimed by the landowner, the condemnor could deposit \$10,000 and take possession of the property. Obviously, this is not good for the landowner. The rest of the changes in this section deal with the this same change of allowing the condemnor to take possession of the property with less money deposited with the Court, which also makes less money available for the landowner to pay for his lawsuit.


Conclusion:

Overall, S.B. 288 does not provide any help to Montana landowners and only makes the condemnation process more arduous and prone to protracted litigation. Similarly, S.B. 288 does not really assist condemnors. However, S.B. 288 does provide condemnors an avenue for something like a "quick-take;" that is, allowing a condemnor to take possession of a landowner's property for only a fraction of the property's value. Again, this is not good for Montana landowners. Finally, S.B. 288 is simply a bad bill. It is inartfully drafted, internally conflicts with itself, and attempts to "fix" parts of Montana's condemnation statutes which require no fixing and have not historically been a problem for either condemnors or landowners.

Draft Amendments:

I have reviewed a set of draft amendments and these amendments do not fix the multitude of issues raised above in this analysis. The amendments would change the words "state or its agents," to "condemnor;" however, the bill defines "condemnor" in such a way that the bill attempts to give condemnation authority to the "condemnor" in this definition. This provision would be low hanging fruit for trial attorneys representing landowners because of the case law mandate that the Legislature's grant of authority for condemnation must be explicit and not implied. This attempt to create condemnation authority through a general definition would create much fodder for litigation and would obfuscate the Legislature's duty to provide clear condemnation authority.

Sincerely,



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